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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 95-61
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") hereby submits the following reply comments to the Commission's Notice of Inquiry ("NOI") in the above-captioned matter.

In its initial comments, DIRECTV urged the Commission to be vigilant in exercising its regulatory oversight to protect emerging MVPD competition to cable television. The past year has finally provided a glimpse of the potential that technologies like DBS, wireless cable and video dialtone have to compete with and in time reduce cable's dominance in the market for multichannel video programming distribution. It is, however, a critical time in the development of competition to cable. Alternative technologies like DBS will eventually offer customers more choice and competitive video alternatives, but only if the Commission remains committed to aggressively enforcing existing legal and regulatory provisions, and to developing the proper competitive framework for the MVPD marketplace.

The record to date underscores the need for such vigilance and resolve on the part of the Commission. The comments show that the emergence of real MVPD competition to cable is as tenuous as it is promising. They provide additional evidence of the strategies that the major cable MSOs have adopted and continue to implement to preserve and extend their market power.

Concentration in the cable industry -- by far the largest segment of the MVPD industry -- undisputedly has increased. NCTA reports that over the past year, TCI, the nations' largest MSO, has increased its share from 17.67% to 19.50% of all cable subscribers,[1] while Time Warner Cable has increased its share from 12.2% of cable subscribers to 14.51%.[2] NCTA also reports that vertical integration in the cable industry has remained constant.[3]

Yet, at a time the cable industry is becoming more concentrated, the nation's largest MSOs are actively and aggressively seeking to undercut emerging competition. Time Warner, for example, as it did in its comments in this proceeding last year (and as it has attempted to do in every proceeding related to program access since the 1992 Cable Act was passed), continues its relentless assault on the Commission's program access rules, replaying a variety of arguments that lack as much merit now as when Time Warner first made them to Congress and the Commission several years ago -- and lost. In fact, Time Warner's claim that "[t]he Commission's continuing assumption that vertical integration of cable operators and programmers has led to anticompetitive practices is insupportable"[4] is directly

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1/ The NCTA calculation does not even take into account the announcement two days ago that TCI intends to acquire all of Viacom's cable systems. This transaction will give TCI an additional one million subscribers. See Eben Shapiro, Viacom Agrees to Spin Off, Then Sell Its Cable Systems, The Wall Street Journal (July 26, 1995).

2/ Comments of the NCTA (June 30, 1995), at 25-33

3/ Id.

4/ Comments of Time Warner at iii.

challenged by Time Warner's own program access disputes with Liberty Cable.[5]
Significantly, Time Warner just last year was on the losing end of the Commission's first adjudicated program access decision, where the Commission found that Time Warner's exclusive contract with Court TV (a vertically integrated programmer) had anticompetitive effects on competing multichannel distributors, and was not in the public interest.[6]

There is no question that vertical integration has played an important role in the development of cable programming. But for Time Warner and its vertically integrated programming affiliate, HBO, to argue that "government regulation of program access is simply unnecessary" ignores the enormous market power that created the need for and still justifies current vigorous enforcement of the program access rules. Until the program access provisions were passed, DIRECTV had been unable to secure <u>any</u> vertically integrated programming from cable-owned programming providers. It is therefore truly ironic that Time Warner points to DIRECTV's ability to carry "unprecedented numbers of NFL and NBA games on its 150-channel-plus service" as evidence of DIRECTV's emerging competitive success and lack of need for program access rules.[7] Had Time Warner's position been adopted by Congress or the Commission in the first instance, DIRECTV likely would not have been able to have accumulate the core of vertically integrated cable program offerings necessary to make its business viable enough to attract additional programming from the sports leagues. Indeed, DBS service might not be a reality today.

5/ <u>See</u>, <u>e.g.</u>, Comments of Liberty Cable Company, Inc. (June 30, 1995), at i ("Liberty's experiences with Time Warner in New York City illustrate the anticompetitive environment created by cable operators.").

6/ <u>See</u> 1994 Competition Report, 9 FCC Rcd 7442, 7529 (1994), at ¶ 176 (citing Court TV Exclusivity Order)

7/ Comments of Time Warner (June 30, 1995), at 23 (footnote omitted).

The nominal acceptance by cable of the program access rules has forced cable to shift its strategy. The most recent attempt to stifle independent MVPD competition now involves the Primestar venture, which represents the collective efforts of not only Time Warner, but also TCI and the nation's other largest MSOs to extend their market power to the DBS segment of the MVPD marketplace. Bringing enormous political pressure to bear, Primestar and the large cable MSOs have been pressing furiously for a reversal of the International Bureau's decision in the Commission's Advanced proceeding, which to date has prevented Primestar from acquiring all of the spectrum at one of the three prime DBS orbital locations.[8]

Primestar hopes to convince the Commission that its acquisition of fully 1/3 of the most prime DBS spectrum is the best way to achieve "the evolution towards a competitive DBS marketplace":

> It is germane to this proceeding that PRIMESTAR's proposed entry into the DBS arena represents the only chance for a competitive DBS marketplace in the near-term. It is only in the context of a competitive DBS marketplace that DBS providers will be forced to evolve, exploring new technologies, customizing service offerings to consumer's tastes and establishing competitive prices.

Reply Comments of Primestar Partners, L.P. (July 25, 1995), at 5. Primestar once again intentionally turns the notion of "competition" on its head.

Primestar's MSO partners currently control well over half of the 60 million cable subscribers in the United States, at least 15 of the 25 most popular programming channels, and a significant percentage of all video transponders serving the United States. Congress and the Commission time and time again have appropriately defined the relevant

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8/ See In the Matter of Advanced Communications Corporation, DBS-94-11EXT, DBS-94-15ACP, DBS-94-16MP, Memorandum Opinion and Order (April 27, 1995).

market to include all MVPD providers -- including cable operators, DBS, wireless cable, TVRO, SMATV and video dialtone providers.[9] It is an undisputed fact that cable dominates and exercises market power in this market. And to allow cable to extend that dominance into the DBS market segment is plainly anticompetitive.

Primestar's unconvincing responses to any concerns raised about its obvious disincentive to see DBS succeed as an independent competitive MVPD market segment consist only of (1) a claim that "it makes little sense for PRIMESTAR's partners to spend over $1 billion to implement its DBS system and then to jeopardize their investment by failing to compete aggressively as a DBS provider";[10] and (2) an attack on DIRECTV's concerns as "self-serving," because "[i]f DIRECTV believed that PRIMESTAR would be a competitor in name only, DIRECTV would welcome PRIMESTAR's entry into the DBS arena and anticipate continuation of its dominant status."[11] These largely rhetorical responses are utterly without merit.

Primestar may well "compete aggressively as a DBS provider" -- but not against its cable owners. Primestar's essential design is to compete against DIRECTV and other emerging independent DBS providers in rural areas only.[12] In addition, Primestar will be the centerpiece of the TCI "Headend-in-the-Sky" program, which will use high-power DBS capacity to provide distribution to cable headends around the country.

9/ See, e.g., 1994 Competition Report, 9 FCC Rcd at 7467, ¶¶ 49-50.

10/ Id.

11/ Id.

12/ Primestar itself admits that "approximately 80% of PRIMESTAR's subscribers are from areas not served by cable systems." Comments of Primestar Partners L.P. (June 30, 1995), at 4-5.

It is not difficult to see how these applications make "sense" for Primestar, but work to the detriment of competition and competitors to cable. They would increase the Primestar MSOs' penetration into and dominance of the MVPD market in rural areas via DBS, and would increase channel capacity to a variety of cable systems. And the Primestar MSOs would also control a huge portion of spectrum that would otherwise be developed in a less cable-friendly fashion by an independent provider with more incentive to compete directly with these MSOs' core cable operations. They would not, however, generate the effective competition envisioned by Congress and the Commission when they sought to promote the emergence of alternative MVPD technologies.[13/] Instead, Primestar will ensure that a major portion of the DBS spectrum is used in a way that is complementary to and not competitive with large MSO cable businesses.

Moreover, there is no question that, over time, Primestar's occupancy and cable's control over the development of a major portion of DBS spectrum and service could profoundly affect and severely weaken this emerging industry. With respect to new programming, for example, allowing the Primestar MSOs to control both cable and DBS operations decreases the available outlets for new programming. Non-vertically integrated programmers will find it difficult to achieve sufficiently high distribution to gain economically attractive revenues over time. And thus, less new programming will be created. As Lifetime points out, increasing competition in the video marketplace "is best

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13/ Bill McConnell, "It's dish-to-dish combat for DBS," Warfield's Business Record (April 28, 1995), at 1 (Primestar spokesman observes: "Primestar allows (cable operators) to expand their customer base. It's a simple business decision.") (emphasis added).

fostered by creating additional viable outlets for programming."[14] Yet, Primestar's acquisition of Advanced Communications' orbital spectrum would specifically undercut that goal by substituting the largest cable MSOs for a formerly new and independent distribution outlet.

Finally, characterizing Primestar's entry into DBS via the Advanced acquisition as "pro-competitive" is perverse. As the Commission observed in last year's Competition Report:

> In the longer term, increased rivalry in the market for delivered multichannel video programming should result in lower prices relative to present cable rates, and in a substantially broadened array of programming options for increasingly specialized audiences. In addition, consumers should receive more pricing options. Such rivalry may also be expected to provide a stimulus to more rapid development of new technologies and product innovation. At present, market performance in local cable markets does not yet reflect the benefits of this competitive rivalry. Therefore lowering barriers to entry is likely to lead to significant gains in consumer welfare.

1994 Competition Report, 9 FCC Rcd at 7541-42. ¶ 203. Although 1995 has seen promising strides in the development of emerging competition to cable, the prospect of the public ever capturing fully the benefits of "vigorous rivalry" in the MVPD market will not happen if the Commission allows the cable industry to dominate DBS. The Commission should not sanction this result.

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[14] Comments of Lifetime Television (June 30, 1995), at 3.

Respectfully submitted,

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